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THE ROLE OF THE PROSECUTOR IN THE INVESTIGATIONS AND PROSECUTION PHASES OF THE CRIMINAL PROCESS IN THE LIGHT OF THE NEW ROMANIAN CODE OF CRIMINAL PROCEDURE

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Abstract

Among the other important changes the new Romanian Code of Criminal Procedure have introduced in the criminal proceedings, those concerning the activity of investigating and prosecuting entail some clarifications of the attributions, a renaming of certain documents and acts issued by the Prosecutor, as well as expand the possibility for the investigators or the Prosecutor for gathering any kind of evidence during the investigation phases. In the same time, the legislator created guaranties of respecting the legal rights and freedoms for the suspected person in as manner as for the prosecuted person.

Key words: ordinance, indictment, resolution, dismissal the case, waiving the prosecution, judicial control of Prosecutor's acts.

Introduction

In the recent years Romania went through a period of profound transformation in the judiciary field, among the others, by adopting the New Civil Code in 2009 which came into force in early 2013 as well as adopting a new Criminal Code by the Law no. 286/2009, which entry into force is previewed on February 1, 2014 together with the new Code of Criminal Procedure¹. The adoption of a new package of civil and criminal codes, both in substantial and procedural matters, is a crucial moment in the evolution of the Romanian legislation².

If analyzing all the changes introduced by the new Romanian Code of Criminal Procedure³ (hence, the new R.C.C.P.) with regard to the activities of the prosecution phase, contained in the Title I of the Special Part, we observe that most of them concern only some formal aspects and just a few of them involve substantial changes in the matters relating to the jurisdictions, attributions, procedural terms and the relationship between different judicial bodies.

The renaming of some terms

In respect of the former changes, we may recall that all the prosecutor acts, like ordering some procedural measures or closing a criminal file, with few exceptions, are going

¹ See, L. R. Popoviciu, *Legislative changes governed by the New Criminal Code in defining the notion of offense. Legislator's orientation: Romanian legislative tradition and European legal systems*, in AIJJS no. 2/2012, p. 155.

² Idem

³ See, The Law no. 135/2010 regarding the new *Romanian Code of Criminal Procedure*, published in the Official Monitor of Romania, no. 486/15th of July, 2010.

to be called *ordinances* (Article 286 paragraph 1 of the new R.C.C.P). The *indictment* remains as the act which enshrines the end of the criminal prosecution and also the referral to the court, but is given a different content in the light of the new R.C.C.P. (Article 328 paragraph 1 of the new R.C.C.P). We can observe, *the resolution* disappears from the categories of the documents issued by the Prosecutor and thus also, all the controversies, essentially useless, on which of the names, the *ordinance* or the *resolution*, should be employed for certain acts of the Prosecutor. Instead, it is expressly provided by the text of the law (Article 286 paragraph 3 of the new R.C.C.P), the Prosecutor confirms an act or a procedural measure by a written statement indicating also the legal grounds, appearing directly on the act in question. Although the documents issued by the Prosecutor will be no longer entitled so, in fact, this is what we currently name a *resolution*.

Regarding the ways a criminal case can be notified to the competent judicial bodies, including the special procedures of *the flagrant crime* and *the prior complaint*, the changes brought by the new R.C.C.P are not essentially. Basically, they are designed to eliminate the ambiguity currently found in the content of many complaints, to give the possibility for new other ways of notifying the judicial bodies as well as to make a more suitable reformulation of the terms.

From the perspective of the ways to perform the criminal investigations, depending on the nature and gravity of the crimes as well as the quality of the suspect, according to the new procedural provisions, there are two possibilities: a criminal investigation by the judicial police under the supervision of the Prosecutor or a criminal investigation performed directly by the Prosecutor, with the possibility to delegate the police officers to performing certain acts of investigation.

The supervision of the investigations

The new procedural provisions concerning the ways the Prosecutor does the supervision of the criminal investigations performed by the police officers, respectively, how to assign one or other investigating body according to the nature of the crime, how to give directions, how to confirm or invalidate some investigation acts and so on, don't differ too much to the provisions currently in force. Notwithstanding, we must specify *the current Romanian Code of Criminal Procedure*⁴ (hence, the current R.C.C.P), in its original content of the year 1968 had many differences at that time but it burdened some successive changes of the original provisions until nowadays when the matter we refer to, is very similar with that of the new R.C.C.P.

Regarding the provisions regulating the activities of the investigations and prosecution, it is necessary to make some remarks, because, even though the changes appear to be purely formal, actually, they have a significant implication on performing the criminal investigations and prosecution acts:

- The *criminal investigations* are triggered by a formal act, an ordinance of initiation, with its name so, "*The initiation of the criminal investigation*" which actually means the start of the investigations, firstly in the aim of determining the facts (the so called *in rem* investigations, according to Article 305 paragraph 1 of the new R.C.C.P). This ordinance is issued by the judicial policy, under the condition of confirmation by the Prosecutor. Where, according to the law, the Prosecutor must do himself/herself the investigations, this ordinance will be issued by the Prosecutor. We have to mention another new provision in this matter, brought by the *Law no. 255/2013*⁵ (The law implementing the new R.C.C.P), according to which, if there are enough information

⁴ See, *The Law no. 29/12th of November, 1969* regarding the *Romanian Code of Criminal Procedure*, published in the Official Monitor of Romania, no. 145, 146 /12th of November, 1968.

⁵ See, *The Law 255/2013 for the implementation of the Law no. 135/2010* on the Code of Criminal Procedure and amending and supplementing certain normative acts which comprise some criminal proceedings, published in the Official Monitor of Romania, no. 515 /14th of August, 2013.

or evidence, a certain criminal fact had been, most probably, committed by a known person and the formal initiation of the *in rem* investigations had been done, then the judicial police or the Prosecutor must expand the *in personam* investigations in what regarding this person, hence becoming a *suspect*;

- The initiation of *prosecution* is decided by the Prosecutor, when issuing an ordinance in this respect, named “*The initiation of the prosecution*” as soon as, he/she has enough evidence to believe, on the ground of good reasons, that a certain person has committed a certain crime, and there is no one of the cases previewed by the Article 16, paragraph (1) which prevent the prosecution [see, Article 309 paragraph (1) of the new R.C.C.P.];

- The solutions adopted by the Prosecutor, when finishes his/her activity in the pre-trial phase of a criminal case may be:

- *a dismissal* of the case by an *ordinance*, where, from the core content and the form of the complaint cannot be identified enough reasons to initiate the investigations or, there is one of the cases previewed by the Article 16, paragraph (1) of the new R.C.C.P. which prevent the prosecution [see, the Article 327 letter b), the Article 314, letter a) and the Article 315 of the new R.C.C.P.]

- *a waiving* of the prosecution by *ordinance*, according to the Article 327, letter b) of the R.C.C.P., after the initiation of the prosecution was done and before the Pre-Trial Chamber referral of the case, where the conditions laid down in the Article 318, paragraph (1), of the new R.C.C.P. can be invoked. Basically, it’s about those situations of lesser gravity offenses, committed in mitigating circumstances, or by the people without a criminal record and finally, which don’t deserve a prosecution because there is a lack of the public concern in doing it;

- *an indictment*, when the Prosecutor decides the case gathered enough evidence to support the the criminal charges, the legal provisions guaranteeing the truth have been applied, the prosecution phase is concluded and following, the referral of the case before the Pre-Trial Chamber must be done, according to the provisions of the Article 327 letter a) of the new R.C.C.P..

If looking to the changes mentioned above, we can make some important remarks. First of all, it is salutary the initiative of the legislator to create a procedural framework to allow a full gathering of evidence without a necessary passing into the phase of the criminal prosecution. As it’s well known, under the current rules of procedure, gathering certain evidence or conducting certain evidentiary procedures, like the forensic reports, technical appraisals or searches, require a certain legal framework, respectively the prosecution phase to be formally initiated and implicitly the criminal charges to be notified to the accused person.

In principle, this measure of *initiating the prosecution*, by itself is not likely to entail any legal consequences in the sense of deprivation of some legal or constitutional rights of the person concerned. After all, every citizen of Romania enjoys a presumption of innocence⁶ a right with the rank of constitutional principle which assumes that, until a final judgment convicting a person is done, the innocence of him/her is presumed and therefore, any incurring damage and deprivation of rights can be ordered by judicial authorities only as exception and only in those conditions established by the law. As the criminal prosecution is not an exception in the above mentioned sense, in principle, it should not affect to the accused. However, we may note that there are increasingly more cases where the mere

⁶ See, The Article 23, paragraph 11 of the Romanian Constitution, as amended and supplemented by the Law amending the Constitution no. 429/2003 published in the Official Monitor of Romania no. 767/ 31st of October, 2003.

initiation of the prosecution is likely to have consequences for the person against whom it was ordered. For example, the famous people having a public image like politicians, businessmen, artists, people working in mass-media, as well as people having a job in police, army, public administration, or justice, all of them can be affected more than mere psychologically. Those from the first category could suffer a depreciation of their public image with possible consequences on their career or business while those from the last category, could be prevented in getting a better position, a promotion or, in some situations, even to burden a suspension for a period of time. Therefore it's laudable the change of the proceeding allowing all kind of evidence to be gathered during the investigations phase, and not to push somehow the Prosecutor to initiate the prosecution and eventually to accuse a person, mere because, otherwise is not possible to bring certain evidence to the case.

Even though, during the investigations phase, if his/her identity is known, the person must be notified about the crime under investigation and the fact he/she is suspected for committing it, or, according to the case, for aiding, abetting or instigating to its commission (see, Article 307 of the new R.C.C.P.), we consider the suspect's rights, the psychological impact or his/her public imagine cannot be as grave affected as in the case of prosecution when the criminal charges have been officially notified and that person becomes an accused. Moreover, according to the new procedural rules (see, Article 78 of the new R.C.C.P.), the suspect person enjoys the same procedural rights like those previewed for the suspect: the right of silent, of being assisted by a lawyer, of being acknowledged about the evidence gathered in the case, of proposing evidence for his/her defense and others (see, Article 83 of the new R.C.C.P.).

In the other hand, the new procedural provisions create a better procedural framework for initiating the criminal prosecution, which is a later stage and to an upper level in the charging process. After concluding the investigations phase, the Prosecutor already had the opportunity to manage all the necessary evidence to draw the right conclusions, and consequently, can better decide if there are reasonable grounds to believe that a person has committed a crime and to initiate the prosecution or, alternatively, to cease the case if there is a situation which, according to the law, prevents the criminal case to go further than the investigations stage. Regulating in this manner, we think the legislature succeeded to do, very well, a balance between a favorable procedural framework for managing all kind of evidence by the judicial bodies while not harming in any way the legal rights and freedoms of the suspected person.

Turning to other aspects of the pre-trial phase of the criminal process, we find that the provisions of the new R.C.C.P. does not bring considerable novelties in the matters like the extension of prosecution or its suspension, the remitting of the case to the investigation body, the reference to another body for criminal prosecution and the reopening the investigations or prosecution.

In the chapter governing the complaints against the measures and prosecution acts, should be added that, although basically they remain the same, there is a major change to the current regulations, the entering of *the judge of Preliminary Chamber*, who is empowered, *inter alia*, with the task to make the judicial control of that Prosecutor's solutions which cease the investigations and the prosecution by dismissal or waiving the case. These provisions appear as natural, given that one of the reasons why the above institution was created by the legislator is that of doing the judicial control of Prosecutor's solutions not to indict.

Conclusions

As a final conclusion, we can mention that the new procedural regulations brought some clarification in what regard the phases of the pre-trial stage of the criminal process, namely the investigations and the prosecution, together with clear attributions for the investigators and the Prosecutor as well as with enough guaranties of respecting the legal rights and freedoms for those persons against whom the proceedings are running. Another

welcomed change is that clarifying and simplifying the naming of the Prosecutor's acts and his/her final solution in those cases not brought before the court. In what regarding the judicial control of those above mentioned solutions of the Prosecutor, we have to mention the fact this is, also, existing under the current regulations but, the entering of the *judge of Preliminary Chamber*, an expected more specialized judge, will be, for sure, a step ahead for the criminal justice. Finally, the practice is only which can show us if the expectations for these new provisions of the R.C.C.P. in doing a better criminal process will be confirmed or not.

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